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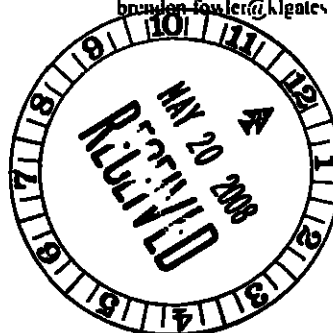
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May 20, 2008

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**Re: STB Finance Docket No. 35087
Canadian National Railway Company and Grand Trunk Corporation –
Control – EJ&E West Company**

Enclosed for filing is the original and 10 copies of the Village of Barrington's Reply to Applicants' Request for Establishment of Time Limit for NEPA Review and Final Decision in the above-captioned proceeding

Please acknowledge receipt of this filing by date-stamping the acknowledgement copy and returning it to our messenger.

Respectfully submitted,

Brendon P. Fowler

Enclosure

cc: All parties of record

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35087

CANADIAN NATIONAL RAILWAY COMPANY AND GRAND TRUNK CORPORATION
- CONTROL -
EJ & E WEST COMPANY



THE VILLAGE OF BARRINGTON'S
REPLY TO APPLICANTS' REQUEST FOR ESTABLISHMENT OF
TIME LIMITS FOR NEPA REVIEW AND FINAL DECISION

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Dated: May 20, 2008

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THE VILLAGE OF BARRINGTON'S
REPLY TO APPLICANTS' REQUEST FOR ESTABLISHMENT OF
TIME LIMITS FOR NEPA REVIEW AND FINAL DECISION

Pursuant to 49 C.F.R. § 1104.13, the Village of Barrington, Illinois ("Barrington") hereby submits this Reply to Applicants' Request for Establishment of Time Limits for NEPA Review and Final Decision ("CN Request").

I. Introduction

Barrington strongly objects to CN's request that the Board adopt the self-serving time limits that CN has proposed for completion of the environmental review process in this proceeding.¹ Contrary to CN's assertions, the Board is not compelled to adopt CN's proposed schedule. In fact, National Environmental Policy Act ("NEPA") guidelines require the Board to provide its Section of Environmental Analysis ("SEA") with adequate time to complete the environmental review process in a manner that provides for sufficient analysis of significant environmental impacts, possible project alternatives and potential mitigation measures based on

¹ CN also repeated portions of its substantive case as part of its request. *See, e.g.*, CN Request, at 10-12. While Barrington takes substantial issue with CN's claims in that regard, this Reply focuses to the central issue of CN's current pleading: the request for time limitations.

extensive public input. The Board must not succumb to CN's attempt to pressure it into short-circuiting the NEPA review process for CN's own financial gain.

II. Argument

Throughout the course of this proceeding, CN has sought to convince the Board to rapidly approve its proposed acquisition of control of the EJ&E West Company (the "Proposed Transaction") with minimal, if any, environmental review.² CN's latest attempt to obtain expedited approval once again demonstrates its lack of respect for the NEPA process and, for the reasons discussed below, is based on flawed reasoning that should be rejected by the Board.

A. CEQ Regulatory Guidance Emphasizes the Need for a Sufficient Environmental Review Schedule That Provides an Adequate Opportunity For Public Participation

Under NEPA,³ the Board is required to analyze the potential environmental impacts of the Proposed Transaction without regard to pressure from CN. The Board determined in November of 2007 that an Environmental Impact Statement ("EIS") was warranted in this proceeding "in view of the large projected traffic increases on certain line segments, and the potential impacts of the proposed transaction on a number of communities that would likely result from the increased activity levels on rail line segments and at rail facilities." *See* Decision No. 2, at 15 (emphasis added). In that decision, the Board also concluded that any final decision date would extend beyond the end of the 180-day period set forth in 49 U.S.C. § 11325(d) in order to accommodate the full environmental review process. *Id.* Now, more than 5 months

² From the outset, CN attempted to convince the Board to establish a mere 156-day schedule for the Proposed Transaction and did not consider the need for environmental review in any meaningful way. *See* Petition Suggesting Procedural Schedule (CN-3), STB Finance Docket No. 35087 (filed October 30, 2007)

³ 42 U.S.C. §§ 4321-4335.

after these determinations by the Board, CN claims that the Board must complete the EIS process on an expedited basis to facilitate CN's own economic interests.

As stated in the Council on Environmental Quality ("CEQ") guidelines that implement NEPA, an EIS is required to contain a "full and fair discussion of significant environmental impacts" from the proposed transaction "in order to inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. An EIS must be supported by evidence that the reviewing agency has completed the necessary environmental analysis of potential environmental impacts based on engagement with and facilitation of public involvement in the process. *See* 40 C.F.R. § 1500.2(b), (d). According to the CEQ guidelines, "[a]ccurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40 C.F.R. § 1500.1(b).

As the Board recognized in its November 2007 decision, NEPA requires it to obtain and analyze all the environmental information necessary to take a "hard look" at the environmental consequences before it determines whether to approve the Proposed Transaction, deny it, or approve it with environmental mitigation or other conditions. In preparing the draft EIS ("DEIS"), the Board's SEA must complete its detailed analysis of the potential environmental impacts and any project alternatives before it can consider any potential mitigation measures. In addition, the SEA must give the public an adequate opportunity to review and comment on both the environmental analysis and any proposed mitigation set forth in the DEIS. The SEA can complete the final EIS ("FEIS") only after it has considered the public comments filed in response to the DEIS, performed any necessary supplemental analysis, and finalize its proposed mitigation measures.

CN wants the Board to complete these various tasks within time limits that CN alone claims are adequate to complete the EIS process. Although CN provides no specific support for its assertion that such time limits are reasonable under the circumstances, CN nonetheless argues that the Board must adopt CN's proposed time limits.⁴ CN's position is not consistent with CEQ guidelines and completely ignores the significant environmental issues raised by CN's Proposed Transaction.

The CEQ guidelines provide that federal agencies shall set time limits on the NEPA process upon request of the applicant for a proposed action; provided, however, that such limits are consistent with NEPA and essential considerations of national policy. *See* 40 C.F.R. § 1501.8(a). Federal agencies may consider the following factors in determining such time limits: (i) potential for environmental harm; (ii) size of the proposed action; (iii) state of the art of analytic techniques; (iv) degree of public need for the proposed action, including the consequences of delay; (v) number of persons and agencies affected; (vi) degree to which relevant information is known and if not known the time required for obtaining it; (vii) degree to which the action is controversial, and (viii) other time limits imposed on the agency by law, regulations, or executive order. 40 C.F.R. § 1501.8(b)(1)(i)-(vii). As explained below, these various factors in the aggregate require the Board to adopt an environmental review schedule that provides sufficient time for the SEA to complete its work and for the public to review and comment on SEA's findings before the Board issues a final decision. As discussed further herein, Barrington strongly believes that SEA and the public need much more time than is provided under CN's proposed schedule to complete the environmental review process.

⁴ *See* CN's Request, at 25 (asserting that the requested time limits "are required by CEQ regulations").

CN attempts to dismiss one of these factors outright – the degree to which action is controversial – by arguing that the Board already accounted for this factor when it decided to prepare an EIS. CN's argument misses the point. The CEQ regulations specifically state that the amount of controversy may be considered in establishing time limits (and not necessarily in determining whether to prepare an EIS). In this case, the Board is well aware of the vigorous differences of opinion between CN and various interested stakeholders (including Barrington) about the nature, scope and severity of the anticipated environmental impacts of the Proposed Transaction.⁵ Thus, it is imperative for the STB to incorporate sufficient time into the process so that the public has a meaningful opportunity to review and comment on SEA's findings.

CN attempts to dismiss many of the other factors referenced in the CEQ guidelines by making the conclusory assertion – without any support – that such factors are accommodated by CN's proposed time limits. *See* CN Request, at 14-15. CN does not even attempt to explain how

⁵ Having acknowledged that this is a very controversial Proposed Transaction, Barrington notes that the Daily Herald article of May 13, 2008, quoted in footnote 14 of the CN Request, misquotes Village President Darch. Ms. Darch read from a prepared text and the portion of her text relevant to the misquotation in the Daily Herald reads as follows:

We have argued that even if the STB mandate required that the purchase be approved, the National Environmental Protection Act [sic] (the other prong of the STB analysis) allows the STB not to approve the transaction because of its impact. We recognize that such a decision, essentially unprecedented by the STB, is only a possibility yet we think that is the correct one. If the transaction is ultimately approved, we believe NEPA requires that CN be responsible financially, and before allowing it to run its multitude of long freight trains, requires it to fix the problems it will bring to our Village and our region as any other business would have to, which would include grade separation, and noise, vibration and air quality mitigation. We will continue to press our cause and case and call on and challenge our federal elected officials to do more to support us in this fight. Surely the laws of the United States protect and maintain a balance between commerce and community life and if not, should be made to

See State of the Village 2008 (May 12, 2008), available at <http://www.ci.barrington.il.us/News/NewsReleaseDetail.asp?ID=232>

its proposed time limits account for the potential environmental harm, the number of persons affected, and the degree to which relevant environmental information is not known. Given the severity of environmental harm that CN's Proposed Transaction is likely to have on a number of different constituencies, and the need to forecast future impacts and perform technical analysis (such as noise and vibration testing) on those impacts, all of such CEQ factors militate in favor of developing an environmental review schedule that builds in sufficient time to adequately complete the process.

CN's entire argument essentially hinges on its assertion that the 180-day period specified in 49 U.S.C. § 11352(d) somehow now compels the Board to adopt CN's desired schedule without regard to the actual time needed to complete the EIS process. CN has known for more than 5 months that the Board expected the environmental review process to extend the final decision date beyond the 180-day period (which passed on April 25, 2008). Nonetheless, CN now argues that the 180-day period set forth in § 11352(d) requires the Board to complete the environmental review on an expedited basis (even though that time period would have expired more than 7 months prior to the final decision date that CN seeks in its proposed schedule). This makes no sense. As the Board has recognized, it has an obligation under NEPA to complete the environmental review process in an adequate manner. If the Board determines that it must adopt time limits at this stage in the proceeding, the relevant CEQ guidelines require the adoption of a schedule that provides SEA and the public with ample time to complete the environmental review process required under NEPA. CN's claims to the contrary are entitled to no weight.

B. CN's Assertion that Extensive Environmental Review Harms the Public Interest Prejudges the Outcome and Ignores the Significance of the Environmental Review

In effect, CN argues that permitting the environmental review process to run its full course will somehow harm the "public interest" related to the Proposed Transaction. CN bases

this questionable conclusion on its claim that “the significant public benefits of the Transaction are at risk because of continuing uncertainty as to the terminal date of the environmental review process and the proceeding.” CN Request, at 5. CN warns that extensive environmental review could jeopardize its ability to complete the Proposed Transaction as a result of a private deadline established in its agreement with U.S. Steel.⁶ CN also darkly hints that if the Proposed Transaction is not consummated, then “alternatives, including increased interchange and haulage, which would not require NEPA review, will likely be available that would nonetheless allow CN, other carriers, or both to move additional traffic over the EJ&E.” CN Request, at 12-13.⁷

The foregoing arguments by CN presuppose that the outcome of the environmental review process will be a finding that the Proposed Transaction is in the public interest, and therefore any delay in that finding would harm that public interest. To the contrary, the Board’s environmental review of the impact of the Proposed Transaction on affected areas along the EJ&E is critical to the Board’s ultimate decision whether or not to approve the Proposed Transaction, reject it or approve it with mitigating conditions. Moreover, CN’s arguments assume that the Proposed Transaction will not have any adverse environmental impacts, or that such adverse environmental impacts are outweighed by the purported benefits. This is a determination that the Board can make only after considering the results of the EIS process.

⁶ As discussed further herein, Barrington disagrees with CN’s conclusion about the significance of the alleged closing “deadline” set forth in the Stock Purchase Agreement between CN and U.S. Steel.

⁷ Barrington disagrees with CN’s assertion that such alternatives would not require environmental review.

1. The Board's Final Decision Must Account for the Significant Environmental Impacts of the Proposed Transaction

Congress did not intend the Board to "contemplate the environmental impact of an action as an abstract exercise" but instead that the requisite "hard look" be "incorporated as part of the agency's process of deciding whether to pursue a federal action."⁸ Consequently, the Board will include the EIS and related comments and responses in the record and consider them in the course of issuing its decision on the Proposed Transaction. 49 C.F.R § 1105.11(f), *see also* Notice of Availability of the Final Scope of Study for the Environmental Impact Statement (EIS), STB Finance Docket No. 35087, 5 (STB served April 23, 2008) ("In reaching its decision on this case, the Board will take into account the full environmental record, including the Draft and Final EIS, and all public and agency comments received.") The EIS must evaluate reasonable and feasible alternatives for the Proposed Transaction, including "approval of the transaction as proposed, disapproval of the proposed transaction in whole (No-Action alternative), or approval of the proposed transaction with conditions, including environmental mitigation conditions." *Id.*⁹ The environmental review process is therefore integral to the Board's overall assessment of the Proposed Transaction, and bears directly on the Board's ultimate decision to accept the Proposed Transaction, reject it, or accept it with modifications or conditions.

If the Board disapproves the Transaction based in whole or in part on the results of the environmental process, the Board necessarily will have found that the adverse environmental

⁸ *Baltimore Gas and Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 100 (1983)

⁹ Barrington will shortly file letter comments on the Final Scope of Study further explaining its view that SEA must fully evaluate additional alternatives to the Proposed Transaction

impacts outweigh the potential benefits. CN simply assumes away the significant possibility that the negative environmental impacts of the Proposed Transaction would harm the public interest by arguing that time spent on the environmental process itself will harm CN's narrow, self-serving definition of the public interest. That result contravenes both the purpose and the express mandates of the NEPA review process.

2. Affording SEA a Reasonable Time to Complete the Required Environmental Review Increases the Likelihood that the Public Interest Will Be Served

The Board must give SEA adequate time to complete the environmental review process required under NEPA. SEA already has acknowledged the importance of engaging in a substantive environmental review along the EJ&E Line. The shifting of rail traffic from downtown Chicago to the little-used EJ&E corridor, combined with additional national and international traffic growth on the EJ&E Line from other sources, will have significant local and regional environmental impacts. One of the central purposes of NEPA is to "focus[] the agency's attention on the environmental consequences of a proposed project" such that "important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast."¹⁰ If the Final EIS is fully compliant with NEPA and the CEQ regulations, and fully addresses all relevant environmental and mitigation issues, it likely will minimize the number of legal challenges brought based on the environmental review process. Forcing SEA to generate a hasty, abbreviated, or incomplete EIS based on unreasonable time limits ultimately derived from CN's own poor planning may shorten the environmental review process in the near term while ultimately prolonging the overall review of the Proposed Transaction significantly.

¹⁰ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

3. CN's Proposed Schedule Is Driven By Profit, Not the Overall Public Interest

It is obvious, but bears repeating, that CN's motives in pursuing the Proposed Transaction are not altruistic. CN is a very profitable Class I railroad that, with its subsidiaries, operates a network of approximately 20,400 route miles.¹¹ CN's revenue in 2007 was nearly \$8 billion dollars Canadian, and CN enjoyed an operating income of nearly \$3 billion dollars Canadian.¹² CN's own Application represents that

CN's primary purpose in seeking the acquisition of the EJ&E lines is to improve its operations in and beyond the Chicago area by providing a continuous rail route, under CN's ownership, around Chicago that would connect the five CN lines that presently radiate from the city. Currently, Chicago is a major chokepoint in the CN system

See Application, at 61 (Radloff V.S.) (emphasis added) The real intended beneficiary of the Proposed Transaction is CN. It is disingenuous for CN to argue that the "Board risks precluding the public benefits of this Transaction"¹³ if it does not permit CN to close by the end of 2008 when CN's ultimate goal is to increase traffic congestion and all of its related adverse environmental impacts on the rail lines surrounding Chicago. The direct and immediate consequences of the Proposed Transaction will result in heavy costs and burdens to communities along the EJ&E Line, the full extent of which will not be known without a full environmental review. CN should not be permitted to avoid the costs associated with its proposed actions by forcing SEA to circumscribe its environmental review

¹¹ See CN Investor Facts 2008, available at http://www.cn.ca/investor/overview/fact_sheet/pdf/Fact-Sheet-May-2008-cn.pdf.

¹² *Id*

¹³ CN Request, at 12.

C. CN's Proposed Schedule Is Not Reasonable For This Case

As previously noted, CN originally tried to convince the Board to adopt a brief 156-day schedule for the proceeding in an expedited fashion. *See* Petition Suggesting Procedural Schedule (CN-3), STB Finance Docket No. 35087 (filed October 30, 2007), at 2. Now, CN returns with another expedited scheduling request, this time seeking to convince the Board to recognize the December 31, 2008 closing "deadline" CN established in its Stock Purchase Agreement with U.S. Steel, before the Board had even determined it necessary to create an EIS.

CN specifically requests that the Board adopt a schedule for the remaining environmental review process consisting of the following: 1) Draft EIS served on July 15, 2008; 2) comments due on the Draft EIS on September 2, 2008, 3) Final EIS served on November 3, 2008; and 4) final decision served on December 1, 2008. CN Request, at 24. While that schedule may precisely and transparently fit CN's desires, it is not reasonable and does not provide sufficient time for necessary public comment and input into the environmental process.

The environmental review process in this proceeding is already well advanced. The next major step will be the issuance of the Draft EIS. Normally, the Board allows at least 45 days following service of the Draft EIS for the submission of written comments. 49 C.F.R. § 1105.10(a)(4). However, given the extensive public participation in the environmental process in this proceeding, Barrington believes that a mere six week period will not be sufficient for parties to review and analyze the likely extensive Draft EIS, independently gather and analyze information and data, and develop comments on the Draft EIS. In addition, given past conduct in the proceeding it is also likely that CN will file comments that would require additional review and possible comment by parties that do not subscribe to CN's views on the impacts of the

Proposed Transaction. Barrington respectfully requests that the Board provide a Draft EIS comment period of at least 120 days.¹⁴

D. Contrary to CN's Assertions, Section 9.1 of the Stock Purchase Agreement Prevents US Steel From Backing Out of the Proposed Transaction if the EIS is Issued After December 31, 2008

CN argues that uncertainty regarding the NEPA review schedule puts the Proposed Transaction at risk because under the terms of the Stock Purchase Agreement ("SPA") between CN and EJ&E,¹⁵ "if the deal is not closed by December 31, 2008, either party may be able to terminate the Agreement, and neither party may be able to compel the other to close. SPA § 2.3, CN-2 at 259."¹⁶ See CN's Request, at 12 CN goes on to say that there is no reason to expect U.S. Steel to agree to an extension of the alleged "deadline" and that if the parties cannot close by December 31, 2008, "CN could be denied the option of ever closing " *Id.*

CN oversimplifies the mechanisms of the SPA. Despite CN's assertions to the contrary, it is not at all certain that U.S. Steel will have the right to unilaterally terminate the SPA if Closing does not occur by December 31, 2008 due to ongoing NEPA review by the Board. CN completely ignores Article IX – the Termination provision of the SPA. Section 9.1(b) of the SPA provides, *inter alia*:

This Agreement may be terminated and the transactions contemplated hereby may be abandoned, at any time prior to Closing: by any Party if the Closing shall not have occurred by December 31, 2008; provided that the right to terminate this Agreement under this Section 9.1(b) shall not be available (ii) if the reason for the failure of the Closing to occur on or before such date is one or more of the

¹⁴ See The Village of Barrington's Comments to the Draft Scope of the Environmental Impact Statement (BARR-3), STB Finance Docket No. 35087 (STB served February 15, 2008), at 6.

¹⁵ EJ&E is an indirect wholly-owned subsidiary of United States Steel Corporation ("U.S. Steel").

¹⁶ For ease of reference, a copy of § 2.3 of the SPA is attached hereto as **Exhibit A**.

following: ... (C) the STB has not completed such review of the transactions contemplated by this Agreement as maybe required under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq. or the National Historic Preservation Act, 16 U.S.C. § 470, in connection with the Exemption Proceeding and the Control Proceeding.

(emphasis in original).¹⁷

The CN Request is bereft of any reference to the termination provisions in Article IX of the SPA, and instead relies on the general language of § 2.3. Section 2.3 discusses Closing and makes general reference to termination but it itself cross-references Section 9.1(b)(ii) of the SPA for guidance on termination. *See* Exhibit A. There seems to be a direct conflict between the language in Section 2.3 and the language in Section 9.1(b)(ii), and thus it is not at all clear that U.S. Steel would have any right to walk away from the Proposed Transaction if the NEPA review is not completed by December 31, 2008.¹⁸

It is clear from the SPA that the parties planned for the possibility that the nature of the Proposed Transaction could trigger an environmental review process under NEPA that extended beyond December 31, 2008. Moreover, as a practical matter, nothing precludes CN and U.S. Steel from simply amending any relevant deadlines contained in the SPA. In light of the fact that CN and U.S. Steel mutually established these private deadlines, CN's argument that they will not be able to subsequently revise them as necessary based on actual, rather than anticipated, events that occur in this proceeding ring hollow.

¹⁷ For ease of reference, a copy of Article IX of the SPA is attached hereto as **Exhibit B**.

¹⁸ Indeed, it could be argued that the potential conflict in language between § 2.3 of the SPA and Article IX suggests that the more specific language in Article IX would control over the more general provisions of section 2.3.

E. The Board's Determination That the Transaction is "Minor" Has No Relevance to the Reasonable Time Necessary for Completing the Environmental Review

On November 26, 2007, the Board issued its decision designating the proposed transaction as a "minor" transaction for the purposes of the Board's rules. As such, under 49 U.S.C. § 11325(a) & (d), the Board must publish notice of the application within 30 days of its filing, conclude any evidentiary proceedings by 105 days after notice is published, and issue a final decision by the 45th day after the date evidentiary proceedings are filed. However, these statutory provisions simply do not address the environmental review process. CN's efforts to somehow read the designation of the proposed transaction as "minor" for purposes of 49 U.S.C. 11325 as creating a limit on the time period allowed for preparation of the EIS are unfounded.

1. The Board's Regulations and Precedent Recognize That Final Decisions Will Not Become Effective Until Environmental Issues Have Been Resolved

The Board has enacted regulations "designed to assure adequate consideration of environmental and energy factors in the Board's decisionmaking process pursuant to [NEPA] ..." 49 C.F.R. § 1105.1. Indeed, with regard to the creation of an EIS or other environmental documentation, the Board's regulations expressly state that "[t]he Board will withhold a decision [in a proceeding]... when an environmental ... issue has not yet been resolved." 49 C.F.R. § 1105.11. In addition, recent Board decisions in "minor" transactions have all recognized that the procedural schedule would be extended as necessary to accommodate any necessary or unanticipated environmental review under NEPA ¹⁹

¹⁹ See, e.g., *Kansas City Southern – Control – The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and the Texas Mexican Railway Company*, STB Finance Docket No. 34342 (STB served June 9, 2003), at 21; *Canadian National Railway company and Grand Trunk Corporation – Control – Duluth, Missabe and Iron Range Railway Company, Bessemer and Lake Erie Railroad Company, and the Pittsburgh & Conneaut Dock Company*, STB Finance Docket No. 34424 (STB served December 1, 2003), at 18.

Pursuant to NEPA, the Board's regulations do not inflexibly pair a particular type of environmental review procedure with a particular category of transaction. Instead, the Board's regulations allow for the possibility that an EIS would be prepared even in a transaction for which an EA is more common when "the probability of significant impacts from the particular proposal is high enough to warrant an EIS." 49 C.F.R. § 1105.6(d). The Board clearly indicated that its decision to prepare an EIS was unrelated to its decision to treat the transaction as "minor"²⁰ In this case, the significant environmental impacts warranted an EIS and the procedural schedule must be adjusted accordingly.

2. CN Has Conceded that the Board May Exceed the 180-Day Review Period for a "Minor" Transaction Due to NEPA Requirements

CN has long since conceded that the Board may extend the deadline for its final decision based on the outcome of the environmental process. In response to requests for an EIS in this proceeding, CN stated that

CN recognizes ... that as the Board gathers information in the course of its environmental review of the Transaction, it may find that, to complete that review in accordance with its obligations under NEPA, it will need more than the 156 days called for in CN's proposed schedule, or even more than the 180-day maximum permitted for regulatory review of a "minor" transaction ..

See Reply of Applicants to Request of Village of Barrington for Preparation of Environmental Impact Statement (CN-8), STB Finance Docket No. 35087, at 7 (filed November 21, 2007) (emphasis added). Simply put, CN both conceded and volunteered that the Board could extend

²⁰ As previously noted, the Board stated that it decided to prepare an EIS in order to "ensure that the Board takes the hard look at environmental consequences required by NEPA, which is warranted in view of the large projected traffic increases on certain line segments, and the potential impacts of the proposed transaction on a number of communities that would likely result from the increased activity levels on rail segments and at rail facilities." *See* Decision No. 2, STB Finance Docket No. 35087, 9-10 (STB served November 26, 2007) (emphasis added).

its deadlines as necessary under NEPA before the Board had even issued a decision indicating that it might be required to do so

In addition to affirmatively conceding that the Board is empowered (and indeed, required) to extend any final decision date in order to complete the environmental process, CN also has conceded the issue by failing to challenge it in a timely fashion. The Board's decision indicating the likelihood of extending the final decision deadline due to NEPA requirements was served on November 26, 2007. *See* Decision No. 2, STB Finance Docket No. 35087, 12, 19 n. 20 (STB served November 26, 2007). In that decision, the Board expressly stated that "[t]he time the EIS will take to prepare cannot be determined ahead of time because there is no way to predict in advance all of the specific issues that may arise" and in prior cases "the EIS process has ranged from approximately 18 months to several years." *Id.* at 16. It has taken CN nearly six months since the Board's decision indicating the need for an EIS to file the CN Request, in which CN ironically implies that it is SEA that has been dragging its feet on NEPA issues. CN's Request, at 20-21. There is simply no basis at this late date to entertain CN's complaints regarding the environmental timetable.

F. The *Conrail* EIS Scope and Timetable Do Not Compel Adoption of CN's Proposed Schedule

CN's effort to draw parallels between SEA's progress on the EIS in this proceeding and the EIS timeline in the *Conrail* proceeding is a red herring. As further described below, the substantial differences in both the procedural postures of the two proceedings and the underlying details of the proposed transactions render any comparisons largely meaningless. What little relevance can be determined from the *Conrail* proceeding in fact undercuts CN's by demonstrating that in *Conrail* the SEA had the added benefit of months of extensive

environmental discussions with, and reports from, the *Conrail* applicants sufficient to allow it to immediately commence preparation of an EIS before the application was even filed

1. In *Conrail*, SEA Engaged in Months of Pre-Application Environmental Discussions with Applicants and Had the Benefit of Pre-Application Environmental Reports

CN argues that in *Conrail* “it took SEA just 11 months from the date the application was filed to serve a final EIS, and slightly more than twelve months from when the applicants submitted their Preliminary Environmental Reports (“PERS”)” CN Request, at 17. Contrary to CN’s implication, the environmental review and analysis in *Conrail* extended well in advance of the filing of the application itself and, following the eventual filing of the application, permitted SEA to move rapidly to include the draft scope of study of the EIS in the same decision in which it provided official notice of its intent to prepare an EIS. *See* Conrail Notice of Intent to Prepare an Environmental Impact Statement (EIS) and Request for Comments on Proposed EIS Scope, 1997 WL 365446, *1 (STB served July 3, 1997) Indeed, although the official Notice of Intent to Prepare an EIS was served on July 3, 1997, SEA had publicly stated its intent to prepare an EIS over a month earlier in Decision No. 6, based on discussions with the Conrail applicants and review of their pre-filing environmental reports.

When an environmental impact statement is “required or contemplated,” the prospective applicant must provide SEA with written notice of its forthcoming proposal at least 6 months prior to filing its application. 49 C.F.R. § 1105.10.²¹ In *Conrail* Decision No. 6, issued nearly a month before the application was filed, SEA waived this 6-month pre-filing requirement because “SEA for some time has been engaged in on-going consultations with both CSX and NS about

²¹ Despite acknowledging in the Application that either an Environmental Assessment or an Environmental Impact Statement was necessary for this transaction, Application (CN-2) at 33, there is no indication CN complied with this six month pre-filing notice requirement.

the proposed merger and the potential associated environmental impacts.” *Conrail*, Notice of Issuance of Procedural Schedule, 1997 WL 283551, *3 (STB served May 30, 1997). SEA further noted that applicants’ joint Preliminary Environmental Report “provided detailed descriptive information about the project.” *Id.* Thus SEA’s decision to create an EIS was “based on the nature and scope of environmental issues . . . that are likely to arise in this proceeding as well as SEA’s evaluation of the information available to date, including the Preliminary Environmental Report filed on May 16, 1997.” *Id.* at *2 By the time the *Conrail* application was filed on June 23, 1997, SEA had already had the benefit of months of discussions with CSX and NS, as well as access to detailed environmental reports already generated for the project

In short, in *Conrail* SEA had advance notice and information sufficient to allow it to waive the standard 6-month prefiling notice requirement for an EIS, as well as contemplate the necessity of an EIS and provide public notice of its intent to prepare one even before the application was filed. By contrast, in the present proceeding SEA, apparently without the benefit of pre-filing detailed environmental discussions or reports from CN, was not able to determine the necessity of an EIS until November 26, 2007, nearly a month after CN filed its application. *See* Decision No. 2, STB Finance Docket No. 35087 (STB served November 26, 2007).²² The only relevance the *Conrail* environmental timeline has for this proceeding is to demonstrate that if CN wished SEA to act more expeditiously with regard to the preparation of an EIS, it should have started working with SEA to that effect months before filing the Application.

²² Indeed, even after filing their Application, CN continued to waver as to whether an EIS was even required. *See* Reply of Applicants to Request of Village of Barrington for Preparation of Environmental Impact Statement (CN-8), STB Finance Docket No. 35087 (Board served November 21, 2007) (“...as the Board gathers information in the course of its environmental review of the Transaction ... it may find that the impacts would be potentially significant, requiring preparation of an EIS.”) It is difficult to imagine how CN can fault SEA for its progress on the EIS when CN itself could not commit to the necessity of an EIS with alacrity sufficient to even commence the process until nearly a month after the Application was filed

2. ***Conrail* Did Not Necessarily Involve More Severe Environmental Impacts Than CN's Proposed Transaction**

CN's table comparison of certain factual information from the *Conrail* transaction and the Proposed Transaction is also misleading. *See* CN Request, at 19-20. For example, although CN lists the "[n]umber of rail segments with increases in traffic" in *Conrail* as 289, there were only 11 segments identified in the *Conrail* Draft EIS that involved traffic increases of 20 or more trains per day, located in just two states. Similarly, the Proposed Transaction contemplates at least 11 segments along the EJ&E Line that will see increases of 20 or more trains a day. *See* CN Application, at 247 (Operating Plan, Attachment A.2); *see also* Letter from Paul A. Cunningham to Hon. Vernon A Williams, Surface Transportation Board (CN-14), STB Finance Docket No. 35087 (dated January 3, 2008), at 4 (enclosing Operating Plan, Attachment A.2 errata). Thus, in many respects the environmental impacts from the Proposed Transaction will be similar if not greater than in the *Conrail* transaction.

CN's efforts to describe the overall size of the *Conrail* proceeding might be relevant for a discussion of *Conrail*'s categorization as a "major" transaction, compared to the "minor" designation given to the current proceeding, but are irrelevant to the environmental review process. The simple fact of the matter is that SEA and the Board determined that the potential environmental impacts of the proposed Transaction are significant enough to warrant a full EIS. The full analysis of the environmental issues relevant for the current proceeding is what informs the EIS and drives the related time periods, not comparisons of the current proceedings to other unrelated proceedings. CN's apparent efforts to shame the Board into truncating the environmental process based on comparisons to a "major" transaction such as *Conrail* must be rejected. In addition, as further described below the overall impacts of the proposed transaction might be as regional and national in scope as those in *Conrail*.

3. CN CEO Hunter Harrison Has Repeatedly Stressed the Importance and International Scope of the Proposed Transaction

CN further claims that the situation in *Conrail* involved many of the same environmental impacts as the present proceeding, but on a “much larger scale.” CN Request, at 18. To the contrary, as described in the verified statement of E. Hunter Harrison, President and CEO of CN, accompanying the Application (the “Harrison V.S.”), the EJ&E lines are a “missing link” that will connect CN’s five existing lines into Chicago.²³ Mr. Harrison has further indicated that the Proposed Transaction “will certainly, for one example, help us from a marketing standpoint with Prince Rupert to Memphis service, which is going to be so important to us . . . So this could have a substantial impact on transit times and certainly to the consistency.”²⁴ He has also publicly stated that the proposed transaction will “change significantly [CN’s] whole U.S. network” and that “from an operational strategic standpoint, this just has – it’s huge value to us. I think we really have maybe only scratched the surface on what the potential might be down the line.”²⁵ He has also indicated in other remarks that “Chicago is essential to CN’s rail operations, yet it presents us with major operational challenges. . . . This acquisition not only will give CN an opportunity to expand its service to the North American steel industry, but also will drive new efficiencies and operating improvements on CN’s network.”²⁶

²³ CN Application, at 51 (Verified Statement of E. Hunter Harrison).

²⁴ Statements of E. Hunter Harrison, “CN to Acquire Key Operations of Elgin, Joliet and Eastern Railway,” CN Analyst Conference Call (September 26, 2007)

²⁵ *Id.*

²⁶ “CN to acquire key operations of Elgin, Joliet and Eastern Railway for US\$300 million”, CN Press Release, September 26, 2007 (available at http://www.cn.ca/about/media/news_releases/2007/3rd_quarter/cn_News20070926.shtml).

These representations are not merely optimistic speculations, but descriptions of the strategic vision CN holds for the EJ&E Line. In CN's own words, the acquisition would link its five lines coming into Chicago, and provide network opportunities as far afield as Prince Rupert, British Columbia, and Memphis, Tennessee. Traffic from those facilities, as well as further in along CN's network, would inevitably use the EJ&E Line to transit around Chicago. CN vastly oversimplifies the net impact of the Proposed Transaction when it seeks to characterize it as the purchase of only "158 route miles that span small portions of only two states." CN Request, at 18. In overall scope and network impact, the EJ&E Transaction and its related environmental impacts might be as important and complex as those considered in *Conrail* and should not be minimized in order to "gild" SEA into a significantly shortened environmental review process.

G. Communities Along The EJ&E Will Gain Nothing Except Fair Consideration Under NEPA If SEA Takes The Time Necessary For A Thorough Review Of CN's Proposed Transaction

Contrary to CN's unsubstantiated claim,²⁷ communities opposed to the proposed transaction (or opposed to the transaction absent adequate mitigation) do not seek sufficient time for thorough environmental review for purposes of delay, and will gain nothing but fair consideration if SEA uses the time required for a thorough review.

CN says that it has "actively engaged many communities along the EJ&E arc that have raised concerns about environmental impacts" but that it has "seen communities adopt increasingly rigid and obstructionist approaches to discussions." CN Request, at 22-23 and Exhibit 4 thereto; April 15, 2008 letter from Karen Borlaug Phillips (CN's Vice President of North American Government Affairs) to Vicki Rutson. Meetings and "reaching out" to

²⁷ See CN Request, at 22-23.

communities is a meaningless and self-serving action if, as in this case, the meetings are not backed by CN's sincere willingness to negotiate

Barrington cannot speak for all other communities on the EJ&E arc. However, despite several meetings, conversations, and letters, CN has not made any offers to Barrington, despite Barrington Village President Karen Darch's two written requests to CN CEO Hunter Harrison. Representatives of Barrington met with Mr. Harrison and Ms. Phillips on February 12, 2008. Two days later, Barrington Village President Karen Darch wrote to Mr. Harrison summarizing Barrington's concerns about the CN transaction and inviting Mr. Harrison to offer a "concrete proposal for mitigation sooner rather than later."²⁸ Mr. Harrison wrote back on March 6, 2008, and while he rejected Barrington's proposed mitigation, his letter did not contain any kind of counter-offer.²⁹ Village President Darch wrote to Mr. Harrison again on March 19, 2008, again encouraging Mr. Harrison to make an offer.³⁰ To date, Barrington has no response from CN. It appears that CN's non-response to Barrington's entreaties is CN's pattern. To the best knowledge of Barrington, CN has failed to make substantive offers to assist any communities on the EJ&E arc.³¹

²⁸ See Letter from Village President Karen Darch to CN President and CEO E. Hunter Harrison (February 14, 2008), at 1. A copy of this letter and attachments is attached hereto as **Exhibit C**.

²⁹ See Letter from CN President and CEO E. Hunter Harrison to Village President Karen Darch (March 6, 2008), at 3-4. A copy of this letter is attached hereto as **Exhibit D**.

³⁰ See Letter from Village President Karen Darch to CN President and CEO E. Hunter Harrison (March 19, 2008), at 2. A copy of this letter is attached hereto as **Exhibit E**.

³¹ CN has publicly announced that it anticipates committing approximately \$40 million to mitigate the impacts of increased train traffic along the EJ&E line. Ms. Phillips' letter points out that this is in addition to the \$300 million CN will pay for the EJ&E and the \$100 million the CN has "pledged" for infrastructure improvements on the EJ&E. See Exhibit 4 to the CN Request. The anticipated commitment of approximately \$40 million appears to be a plug number – 10 percent of the sum of CN's acquisition and initial freight capital expense for the EJ&E. CN also

CN's talk of actively engaging communities is just talk. Likewise Ms. Phillips' letter to Ms. Rutson, describing CN's initial rounds of meetings with EJ&E arc communities in the several weeks after January 22, 2008, must be evaluated in the context of CN's complete lack of "concrete" proposals for mitigation and complete absence of settlement agreements with any EJ&E arc communities. One must ask, are all of the EJ&E arc communities "rigid and obstructionist" or is it just possible that CN hopes it can stonewall its way through the environmental review – and do so faster with its cram-down schedule - as long as it continues to have meetings and report its good works to SEA?

The Board should not capitulate to CN's unreasonable schedule demands based on an unsubstantiated assertion that otherwise the opponents will use time for delay, especially when the facts suggest that the exact opposite is true.

III. Conclusion

For the foregoing reasons, the Board should reject CN's attempt to constrain SEA's environmental review based on CN's own self-serving of the likely time periods involved in agency review of the proposed Transaction. If the Board does decide to establish specific time limits at this state of the proceeding, Barrington respectfully requests that the Board provide sufficient time periods given the extensive environmental impacts anticipated from the Proposed Transaction, and the likelihood of continued high levels of public interest and comment

appears to be of the view that its "pledge" for EJ&E infrastructure improvements is somehow related to mitigation. The Board should reject CN's threat that its alleged "budget" to support mitigation will be reduced by any costs "attributable to controversy." CN Request, at 23 and n. 36. CN should not be permitted to unilaterally decide what amounts are reasonable or necessary for mitigation, and should not be allowed to attempt to quash any opposition by threatening to withhold mitigation funds when faced with "controversy." CN should be expected to bear the full cost of the transaction it initiated.

Respectfully submitted,



Kevin M. Sheys

Edward J. Fishman

Janie Sheng

Brendon P. Fowler

Kirkpatrick & Lockhart Preston Gates Ellis LLP

1601 K Street NW

Washington, D.C. 20006

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**ATTORNEYS FOR
THE VILLAGE OF BARRINGTON,
ILLINOIS**

Dated: May 20, 2008

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2008, I caused the foregoing **Village of Barrington's Reply to Applicants' Request for Establishment of Time Limits for NEPA Review and Final Decision** to be served via first class mail, postage prepaid, or by a more expeditious method of delivery, on all parties of record and on the following:

Paul A. Cunningham
Harkins Cunningham LLP
1700 K Street N.W., Suite 400
Washington, D.C. 20006-3804

Secretary of Transportation
1200 New Jersey Avenue, S.E
Washington, D.C. 20590

Attorney General of the United States
c/o Assistant Attorney General
Antitrust Division, Room 3109
U.S. Department of Justice
950 Pennsylvania Avenue, N W.
Washington, D.C. 20530-0001



Brendon P. Fowler

EXHIBIT A

ARTICLE II

PURCHASE AND SALE OF SHARES

§2.1 Purchase and Sale of Shares. On the terms, and subject to the conditions, set forth in this Agreement, the Seller agrees to sell, assign, transfer and deliver to the Purchaser on the Closing Date, and the Purchaser agrees to purchase from the Seller on the Closing Date, the Shares, free and clear of all Liens. The certificates representing the Shares shall be duly endorsed in blank, or accompanied by powers duly executed in blank by the Seller in each case, with all necessary transfer tax and other revenue stamps, acquired at the Purchaser's expense, in accordance with Section 10.13, affixed and canceled.

§2.2 Payment of Purchase Price. In full consideration for the purchase of the Shares, on the Closing Date, the Purchaser shall pay to the Seller the sum of Three Hundred Million Dollars (US\$300,000,000) in cash (the "Purchase Price") by wire transfer of immediately available funds to the account or accounts identified by the Seller in writing at least two (2) Business Days prior to the Closing Date.

§2.3 Closing. The purchase and sale referred to in Section 2.1 and the deliveries and transactions referred to in Section 2.4 (the "Closing") shall take place at 10:00 A.M. (Chicago time) at the offices of Freeborn & Peters LLP as soon as practicable after the last of the conditions set forth in Articles VI and VII (other than those which by their nature will be satisfied at the Closing) is satisfied or waived, but in no event later than the second (2nd) Business Day thereafter or at such other time and date as the parties hereto shall agree, but not later than September 1, 2008, unless Closing shall have failed to occur for one or more of the reasons set forth in Section 9.1(b)(ii) of this Agreement, in which case Closing may be extended to no later than December 31, 2008, after which date this Agreement may terminate at the option of either party. Such date is herein referred to as the "Closing Date."

§2.4 Closing Deliveries. Subject to the conditions set forth in this Agreement, the parties shall make the following deliveries and transactions on the Closing Date:

(a) Simultaneously with the Closing, the Seller shall repay all Indebtedness, if any, of the Company by wire transfer of immediately available funds or as otherwise acceptable to the holders of such Indebtedness, and Seller shall deliver to Purchaser all appropriate payoff letters and shall make arrangements reasonably satisfactory to Purchaser for such holders to deliver lien releases and cancelled notes at the Closing.

(b) The Seller shall deliver to Purchaser all of the following:

(i) certificates of the Secretary of State of the applicable jurisdictions of organization providing that each of the Seller and the Company is in good standing;

(ii) copies of all third party (including landlords) and governmental consents, approvals, filings, releases and terminations required in connection with the

EXHIBIT B

give Purchaser reasonable advance notice of its desire to enter onto such property, including a copy of a work plan describing the work to be performed; and (b) cause to be delivered to Purchaser a certificate or certificates of insurance evidencing insurance in the types and coverage limits reasonably acceptable to Purchaser and naming Purchaser as an additional insured.

(b) As a condition to Seller's obligation hererunder, Purchaser shall grant to Seller all necessary and appropriate access to the site of the Environmental Condition and related property for the purpose of conducting any investigation, response action, or other activities required to investigate, respond to, contain and remediate any environmental loss, injury or liability, and/or restore the environment.

(c) Any remediation, restoration, removal, investigation and corrective action conducted by Seller as required by this Agreement shall be considered complete and fully satisfied as to each environmental liability whenever Seller completes the action and satisfies applicable Environmental Laws for property used for Industrial purposes, as that standard is defined by applicable Environmental Laws. For this purpose, a "no further action" determination or the equivalent finding by the Government or Regulatory Authority with jurisdiction over the site shall be conclusive.

ARTICLE IX

TERMINATION AND ABANDONMENT

§9.1 Termination. This Agreement may be terminated and the transactions contemplated hereby may be abandoned, at any time prior to the Closing:

(a) by mutual consent of Seller, on the one hand, and of Purchaser, on the other hand;

(b) by any Party if the Closing shall not have occurred by December 31, 2008; provided that the right to terminate this Agreement under this Section 9.1(b) shall not be available (i) to any Party whose failure to fulfill any obligation under this Agreement shall be the cause of the failure of the Closing to occur on or before such date, or (ii) if the reason for the failure of the Closing to occur on or before such date is one or more of the following: (A) the STB has not issued a final decision in the Exemption Proceeding or the Control Proceeding; (B) a final decision in accordance with Section 6.5 of this Agreement has been issued by the STB but has been stayed pending administrative or judicial review; (C) the STB has not completed such review of the transactions contemplated by this Agreement as may be required under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq. or the National Historic Preservation Act, 16 U.S.C. § 470, in connection with the Exemption Proceeding and the Control Proceeding; or (D) the labor implementing agreements required by Section 6.14 of this Agreement have not been obtained;

(c) by either the Seller or the Purchaser if there has been a material breach of any covenant or a material breach of any representation or warranty of the Purchaser or the Seller, respectively, which breach would cause the failure of any condition precedent set forth in Article VI or VII, as the case may be; provided that any such breach of a covenant or

representation or warranty has not been cured within twenty (20) Business Days following receipt by the breaching party of written notice of such breach;

(d) by any Party, if there shall be any Law of any competent authority that makes consummation of the transactions contemplated hereby illegal or otherwise prohibited or if any Order of any competent authority prohibiting or denying approval of such transactions is entered and such Order shall become final and non-appealable;

(e) by the Purchaser, if the STB shall have issued a decision (which decision shall not have been stayed or enjoined) that (A) constitutes a final non-appealable order approving, exempting or otherwise authorizing consummation of the transactions contemplated by this Agreement (or subsequently presented to the STB by agreement of Seller and the Purchaser), as may require such authorization and (B) imposes any conditions or requirements contrary to Section 6.5(b); or

(f) by the Purchaser if any Governmental or Regulatory Authority imposes material conditions on the transactions contemplated by this Agreement, which are, in Purchaser's sole discretion, unacceptable to Purchaser.

Notwithstanding any provision to the contrary in this Agreement, the determination by the STB that the transactions contemplated by this Agreement constitute a "significant" transaction within the meaning of 49 C.F.R. §1180.2(b) shall not constitute a basis for the termination of this Agreement by Purchaser.

§9.2 Effect of Termination. (a) If this Agreement is terminated pursuant to Section 9.1 by the Purchaser, on the one hand, or Seller, on the other hand, written notice thereof shall be given to the other party specifying the provision of Section 9.1 pursuant to which such termination is made and describing (in reasonable detail) the event(s) giving rise to such termination, and this Agreement shall be terminated and become void and of no effect with no further liability on the part of any party or any of their respective Affiliates, officers, directors, employees, advisors, consultants, agents or other representatives (except that the provisions of Section 5.3(c) (Confidentiality), Section 5.6 (Public Announcements), Section 5.11(c) (Transfer Taxes), Section 9.1 (Termination), this Section 9.2, Section 10.1 (Expenses), Section 10.2 (Governing Law/Jurisdiction) and Section 10.12 (Waiver of Jury Trial) shall survive any termination of this Agreement and continue in full force and effect).

(b) Upon termination of this Agreement by Purchaser, Purchaser shall reimburse Seller for any and all out-of-pocket costs, including but not limited to Transfer Taxes described in Section 10.14, incurred by the Seller through the date of termination in connection with the consummation of the Spin-Off.

(c) Notwithstanding the foregoing to the contrary, nothing in this Agreement shall relieve either party from liability or damages resulting from any breach of this Agreement, provided that neither party shall be entitled to claim, and hereby expressly waives any right to, any and all lost profits, lost revenues, lost opportunities and consequential, punitive and other special damages (regardless of legal theory).

EXHIBIT C



VILLAGE OF BARRINGTON

February 14, 2008

Mr. Hunter Harrison
President and CEO
Canadian National Railway Company
935 de La Gauchetiere St. W
Montreal, QC H3B2M9 CAN

Dear Hunter,

Thank you very much for taking time to meet with Trustee Roberts and me on Tuesday in Barrington. Your willingness to discuss CN's proposed acquisition of the EJ&E was appreciated.

We hope we impressed upon you that Barrington is a unique community in many ways, but particularly in the impact your use of the "J" will have on life here. We feel that at the close of the meeting you were committed to reviewing options to mitigate the huge negative impact on Barrington particularly our trench solution described in the enclosed copy of our letter to you of February 6, 2008. As discussed on Tuesday, we are part of a coalition of Barrington area communities who are opposed to this transaction because of its effects on all of our lives and the momentum of that opposition is growing. We respectfully suggest that CN prepare a concrete proposal for mitigation sooner rather than later.

Your candor and openness in our meeting were very refreshing. It was with dismay then that after having discussed the interconnectedness of this transaction and the Olympics, which I and others had also heard you mention when you announced the deal, I saw the enclosed CN Q & A sheet at the Northwest Municipal Conference meeting the next evening. I have circled the question and answer regarding the Olympics. While you and I both understand posturing, this sort of misinformation is problematic if it is your desire to have people think CN is being candid.

I hope you are enjoying your trip to the warmth of the South and I look forward to hearing from you soon.

Sincerely,

Karen Darch
Village President

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VILLAGE OF BARRINGTON

February 6, 2008

E. Hunter Harrison
President & CEO
Canadian National Railway Company
935 de La Gauchetiere St. W
Montreal, QC H3B 2M9 CAN

Dear Mr. Harrison,

We have continued to carefully study the implications of CN's proposed acquisition of the EJ&E and watched as other communities up and down the EJ&E line have expressed their serious concerns about and objections to the proposed acquisition. To us, it is now very clear that the environmental impact of CN's proposed acquisition will require mitigation expenditures up and down the line that will easily exceed the \$400 million investment that CN would make for itself in the purchase and in the improvements to the EJ&E line.

In contrast, the central corridor of CREATE would provide a solution for CN (and the other railroads serving Chicago) that would have comparatively modest environmental impacts. We think that the central corridor element of CREATE is a far better alternative than CN's proposed acquisition and one that, despite its own challenges, would be less expensive for CN than the proposed acquisition of the EJ&E with its attendant mitigation expenditures.

We recognize that you likely do not agree with us and that CN will proceed with its plan to acquire the EJ&E. Thus, for purposes of settlement, Barrington would agree to withdraw from this proceeding and not otherwise oppose the CN plan to acquire the EJ&E if CN would agree to pay the full cost of lowering the EJ&E rail line into a trench through Barrington that would grade-separate the line from our streets and allow our streets to retain their current elevation and grade, together with suitable walls and other infrastructure to minimize safety, noise and air quality impacts of the increased freight train traffic.

We are prepared to discuss this proposal with you if you believe such discussions will be fruitful

Sincerely,

Karen Darch
Village President

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Frequently Asked Questions
Proposed CN Acquisition of EJ&E Railroad
Continued



Q: Will hazardous materials be transported on the EJ&E?

A: Yes. As on all rail lines operating in North America, freight trains on the EJ&E will carry raw materials for manufacturing, including hazardous materials. It should be noted that CN operates one of North America's safest railroads, and that CN's commitment to safety will extend to its operations on the EJ&E. Importantly, the U.S. government judges rail transportation to be the safest and most secure means of transporting hazardous materials.

Q: How fast will the trains travel on the EJ&E?

A: According to FRA standards, freight trains on the EJ&E can operate at speeds up to 45 miles per hour. By contrast, it currently can take a CN freight train 24 hours to travel 30 miles through the Chicago region, wasting fuel, increasing vehicle crossing delays, and producing excess emissions into the region's environment. As a result of this transaction, trains that have no need to stop in the region will flow quickly and smoothly to their destination. This acquisition also supports regional economic growth and is a significant step towards preserving the region's role as the transportation hub of North America.

Q: What does this transaction mean for Metra and the proposed STAR line?

A: Nothing in this proposed acquisition would prevent Metra from participating in negotiations to use EJ&E property for the STAR line or other commuter usage. CN has a long-standing relationship with Metra and will continue to work with the agency. Moreover, some communities along existing Metra lines have expressed support for the transaction because it could clear the way for improved Metra service.

Q: What impacts on the environment do freight trains have?

A: While the STB currently is studying the potential environmental impact of this increase in freight trains, the fact is railroads are three times more fuel efficient and emit only one-third of the carbon dioxide of trucks. Nearly every consumer good at one stage of its production moves by rail. A single intermodal train can haul the same freight as 280 semi-trailer trucks. Moreover, because fewer hours of locomotive time to move the freight through the region will be required, we expect fewer emissions will be released into the environment.

Q: What is the CREATE program and how will this transaction affect it?

A: CREATE is a public-private partnership designed to achieve better regional transportation efficiencies and reduce rail freight, passenger and commuter congestion. If the EJ&E transaction is approved, CN will have no need for its construction projects as envisioned in CREATE, but will use its EJ&E investments to reduce congestion, gaining the same results as intended by CREATE. With this transaction, the complexity of CREATE will be reduced. In the meantime, full funding and implementation of CREATE is years down the road, but the need to address congestion on the area's railroads and roadways is immediate.

Q: Is this transaction tied to Chicago's bid to win Olympics in any way?

A: No. Negotiations date back several years, well before there was any idea of Chicago's bid for the Olympics.

Q: How will CN address safety concerns at EJ&E crossings due to the increased number of trains?

A: There is no direct correlation between an increase in the number of trains over any particular crossing and a decrease in safety. Motorists' continued safe behavior at railroad crossings is still crucial. For those mainline EJ&E crossings in Illinois at public streets not yet equipped with gates and lights, the Illinois Commerce Commission indicates that they will be added before the end of 2009.

Frequently Asked Questions
Proposed CN Acquisition of EJ&E Railroad
As of January 2008



Q: What is the EJ&E line and who is buying it?

A: The Elgin, Joliet & Eastern (EJ&E) is a short line railway owned by a U.S. Steel subsidiary that encompasses the Chicago region. In September 2007, CN, a North American rail operator, announced it would purchase a major portion of the EJ&E for \$300 million, for the purpose of improving service to customers in northern Illinois and northwestern Indiana.

Q: How much more rail traffic will result from this transaction? When will we see the increased rail traffic?

A: Over the next three to four years, some suburban communities will see more rail traffic, but others will see less. In addition to existing rail traffic, fourteen locations on the EJ&E line will see an increase between 15 and 26 trains per day. CN currently is meeting with elected officials and civic leaders in each community on the line to listen carefully and be responsive to specific concerns. If the transaction is approved, rail traffic is expected to increase incrementally after the Surface Transportation Board's (STB) Environmental Impact Statement (EIS) is completed and when the transaction closes reaching projected volumes after three construction seasons. This time frame tentatively is expected to be by the end of 2010.

Q: How dramatic of an impact do the proposed train counts pose?

A: While the EJ&E will see increased rail traffic, other rail lines throughout the Chicago region run in excess of a hundred trains per day.

Q: How long will the freight trains idle?

A: CN does not plan for its freight trains to idle on the EJ&E as that would take away from the efficiencies that the acquisition is intended to provide.

Q: How long will the freight trains be?

A: We anticipate trains of 8,000 feet or more. Even if the trains were 10,000 feet long, a train operating at 40 mph (approaching the maximum allowable track speed) would result in less than three minutes of elapsed time, including the advance warning time that gate arms provide when they go down, before the train reached the crossing.

Q: Will trains run at night? What does CN intend to do with the increased noise pollution?

A: Like all of the large freight railroads operating in North America, CN operates 24/7. Throughout this process CN has been and will listen closely to individual community concerns, including noise and vibration issues. CN's goal is to find practical solutions that balance community and transportation needs, which may include assisting in the establishment of "quiet zones" under the Federal Railroad Administration's (FRA) existing rules.

Q: How much money is CN committing to relieve road congestion and ensure safety in local communities?

A: CN has not made any decisions on mitigation options, in large part because the STB currently is soliciting public comments in its scoping process. Also, CN is still completing its own process of identifying specific concerns to affected communities. This completion of the EIS will provide definition for all stakeholders regarding what CN must comply with in order to close the transaction.

Q: What is a "scoping process"? How long will it take?

A: "Scoping" is a process by which the STB solicits public input to determine which environmental issues will require greater emphasis and which should receive less. It will influence the development of the EIS which is designed to address the public's interests regarding this transaction's impact on the environment. Public comment for the scoping process is due by February 1 after which the STB will issue its final Scope of Study.

EXHIBIT D



www.cn.ca

March 6, 2008

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The Honorable Karen Darch
Village President
Village of Barrington
200 S. Hough Street
Barrington, IL 60010

Dear President Darch,

I appreciated having the opportunity to meet with you and Village Trustee Tim Roberts on February 12 to discuss CN's proposed acquisition of the Elgin, Joliet & Eastern Railway Company (EJ&E).

Rail congestion in the Chicago region is a significant concern. It hinders the productivity of the railroad industry and the region and creates major environmental challenges in the urban core. As a founder and proponent of CREATE, CN remains fully supportive of the regional solutions proposed by CREATE. However, after years of severe regional rail congestion, and the likelihood that CREATE will not be implemented in the near term, we have been forced to take several steps, including developing and implementing routing protocols with other Class I carriers that enabled us to reroute thousands of carloads of freight annually away from Chicago. While these steps have been very positive, the benefits they generate can only gain so much, and with congestion continuing to grow, we were able to reach after much work an agreement with United States Steel to purchase the major portion of the EJ&E.

With the acquisition of the EJ&E, CN would shift traffic to the less congested, more efficient EJ&E line, alleviating congestion on our lines into the City of Chicago. With respect to Barrington, CN's traffic projections included in our application to the Surface Transportation Board (STB) show that train traffic would increase from an average of slightly over five trains daily to slightly over 20 trains per day at the conclusion of the three-year implementation period.

As I promised during our meeting, my staff and I have carefully evaluated your proposal to lower the EJ&E rail line through Barrington into a trench as well as providing infrastructure to minimize safety, noise, and air quality impacts related to freight train traffic on this line. We also have considered the other potential option that we discussed during our meeting - relocating the existing EJ&E line that runs through Barrington.

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My colleagues and I approached the concept of a trench with an open mind and carefully considered the costs and operational issues. We took several factors into account:

- existing rail operations in Barrington, most notably the extensive Union Pacific and Metra operations, with a total of approximately 68 trains per day;
- vehicular traffic congestion in the village arising in part from the absence of a highway bypass for through traffic; and
- the downtown location of the existing Metra station.

As we discussed during our meeting, there are a number of operational concerns associated with a trench. In order to enable trains to enter and exit the trench, we would be required to have a gradual descent and ascent, which would necessitate building below ground for more than the 0.8 miles of the downtown area where you consider the issue to be most acute. In fact, we determined that the proposed trench would lower the railroad for three miles. Perhaps most significant, the environmental issues associated with digging a trench are likely to be substantial. As an example, the aquifer in the area is used as a regional potable water source, and we understand that the required excavation could have some serious effects on the water well's efficiency. In addition, pumping stations would have to run continually to handle the water in the trench, which could affect the water table in the area.

After reviewing the steps that would be necessary to allow rail operations with the trench, our best estimate is that construction of the trench and the associated mitigation infrastructure would cost at least \$200 million. So, even if the project were feasible from the engineering, operations, and environmental perspectives, we have no indication that the incremental environmental effects of the transaction, as proposed, would warrant such an expense. Moreover, as a stand-alone project, or as a template for mitigation likely to be desired in many of the more than 30 other communities through which EJ&E runs, the trench approach to mitigation would be prohibitively expensive, precluding the possibility of achieving many, if not all, of the public benefits of the transaction.

After carefully reviewing your proposal, we must conclude that a trench and its associated mitigation measures would be impractical, prohibitively expensive, and would present significant operational and environmental issues. As a result, we do not believe this is a practical mitigation solution

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Similarly, we have also examined the second option discussed at our meeting – relocation of the EJ&E line through Barrington, which brings a different set of implementation issues. We were unable to find an alternate route that did not have a major impact on housing given the number of housing subdivisions and communities in the area or require division of many properties into two parts. The only way to reduce the number of existing homes affected by the new line would be to locate the line through forest preserve land, which we expect would generate significant opposition. Even if an alternate route were possible, such a relocation would require land purchases at a significant cost – assuming that landowners could be persuaded or forced to sell. In addition, we would need to incur the expenses associated with construction of at least eight miles of new track (at approximately \$2 million per mile) required to reroute around Barrington as well as address any required environmental mitigation for some or all of the new line. In the end, if not at Barrington alone, line relocations as a mitigation approach along the EJ&E would, even if feasible, be prohibitively expensive and preclude achievement of the public benefits associated with the EJ&E acquisition.

We recognize your desire to preserve what you consider to be Barrington's "unique" way of life and you are an effective advocate for Barrington's interests. However, each community along the EJ&E line has its own unique interests. As a community leader, we hope you would share our view that you have a responsibility to look at both your local community needs and the broader public interest and to support a framework for practical solutions that effectively address both.

We are at an important juncture with respect to freight transportation. There is a growing recognition by policy experts that the current transportation infrastructure is operating at capacity in many areas and certainly will be insufficient for future freight transportation needs. At the same time, experts recognize the environmental, congestion reduction, and efficiency benefits of moving freight via rail.

While CN is seeking to improve the efficiency of its operations and to reduce rail congestion overall in the Chicago region, we also are mindful of community concerns about the EJ&E transaction. The impact of this transaction is real, but not out of the ordinary. Even after the transaction and phased increases in rail traffic are completed in 2011, the total number of trains on EJ&E lines will be far less than on the lines in many suburban communities.

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I understand the effects of increased freight train traffic in the communities along the EJ&E line, and CN is meeting with these communities to discuss the range of appropriate mitigation measures that will enable the transaction to go forward while also addressing community concerns. We are seeking a constructive dialogue with key stakeholders to find practical means of implementing the transaction in ways that balance the specific needs of communities with the Chicago region's need for a cleaner, safer environment and a more efficient rail transportation network.

CN's team remains interested in meeting with Barrington officials to discuss mitigation options. We believe there are several options that would make it possible to secure the public interest benefits of this transaction and also address the reasonable concerns of Barrington residents. If you and your colleagues are willing to consider options other than the trench or the possibility of line relocation, we would welcome the opportunity to meet with you.

As the STB continues its review of the EJ&E transaction, I am hopeful that Barrington and its coalition partners will focus their efforts on promoting sound public policy, not on distorting CN's record or information on the transaction. Let's agree that we all are seeking a solution that is in the public interest and work toward that end in a reasonable and professional manner.

I appreciate your willingness to meet with me last month, and I hope that we can work together on realistic mitigation options that address Barrington's needs while also enhancing rail transportation in the Chicago region.

Sincerely,

A handwritten signature in black ink, appearing to read "E. Hunter Harrison", with a long horizontal line extending to the right.

E. Hunter Harrison
President and
Chief Executive Officer

EXHIBIT E



VILLAGE OF BARRINGTON

March 19, 2008

Mr. E. Hunter Harrison
President and Chief Executive Officer
935 de La Gauchetiere Street West
Montreal, Quebec H3B 2M9
CANADA

Dear Mr. Harrison:

This letter is a response to your letter of March 6, 2008. On behalf of myself and Village Trustee Tim Roberts, I want to thank you for taking the time to meet with us on February 12.

I am glad to have the benefit of your thoughts regarding the concept of a trench. However, I think there are two fundamental flaws in your underlying assumptions. First, you seem to be suggesting that Metra's operations and station in Barrington and our existing vehicular traffic are traffic challenges that we expect CN to resolve. This is simply not true. Our Metra service and the downtown location of our Metra station are a tremendous benefit to our community. The modest vehicular traffic delay associated with Metra's short, fast-moving commuter trains is more than outweighed by the benefits of the Metra service to our community. The vehicular traffic in Barrington is at times quite congested, but overall our roads work fairly well today. We are not asking CN to address current transportation/traffic issues. We are asking CN to step up and ensure that its business transaction – the acquisition of the Elgin, Joliet & Eastern Railway Company for the benefit of CN and its shareholders - does not create new and unmitigated transportation/traffic impacts (and other impacts) on our community. This is not about the status quo; it is about your project.

Secondly, you are of the view that the effects of the EJ&E acquisition would be incremental. As I explained to you when we met, I do not share your view.

With respect to the idea of relocating the existing EJ&E Line, I think it important for me to remind you that you raised that as an option. Rerouting the EJ&E through the Barrington community is not an option that we advocated or would support.

My first responsibility is to the residents of the Village of Barrington and to the greater Barrington community. However, please do not assume that because I seek mitigation to protect the Village of Barrington and the greater Barrington community that I do not also believe that it is CN's responsibility to protect other communities along the EJ&E line and to ensure the broader public interest. You

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are setting up the false choice between making CN's operations on the EJ&E tolerable from an environmental standpoint in Barrington and making them so elsewhere on the EJ&E. I believe that you have an obligation to do both.

Barrington has proposed and continues to advocate the concept of a trench; CN has explained that it believes a trench is impractical and prohibitively expensive. You indicate a belief that there are several options that would make it possible for CN to acquire the EJ&E and also address the concerns of Barrington residents. You have not, however, proposed any specific ideas. I feel that it is CN's turn to make a specific proposal.

Sincerely,

A handwritten signature in cursive script, appearing to read "Karen Darch".

Karen Darch
Village President